Supreme Court, U.S.
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In The

Supreme Court of the United States

WANG, Chun,

Petitioner(s)

v.

ALBERTO GONZALES,
Attorney General of the United States,

Respondent(s)

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. The Second Circuit Court of Appeal erred in denying Petitioner's request to reopen proceedings for adjustment of status where petitioner is not barred for statutory relief to adjust his status, contrary to the Second Circuit's own decision. The facts and the administrative record disclosed that there was not a valid voluntary departure order at the first place (8 USC § 1229c) and Petitioner did not receive a clear and proper notice of the consequences of failure to depart (INA § 242B (d), (e)(2)(B)).

2. On another hand, the five-year bar for statutory relief to Petitioner who failed to voluntarily depart had expired even if there were a valid voluntary departure order at the first place, contrary to the Second Circuit decision. The BIA's reinstatement of voluntary departure following *Matter of Chouliaris* and *Matter of Shar*, which infringed Petitioner's right to administrative review, is unconstitutional. Petitioner has been eligible to adjust his status as a Section 245(i) beneficiary.

3. There is a conflict between the Circuits in construing the "compelling reasons" for exceptional circumstance in terms of statutory relief. The Second Circuit erroneously narrowed the statute (INA § 242B(e)(2)), ruling that the change of law and extreme hardship for a business and Petitioner were not the compelling reasons for exceptional circumstance.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all the parties appearing here and before the United States Court of Appeals for the Second Circuit.

The petitioner here and appellant below is Wang, Chun.

The appellee below and respondent here is United States Department of Justice, Attorney General Alberto R. Gonzales.

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OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit was entered on August 9, 2005, under the caption Chun Wang v. United States Department of Justice, Attorney General Alberto R. Gonzales, No. 03-4231 (2nd Cir. 2005)(unpublished). The judgment is attached hereto as Appendix "A". Petitioner filed a timely Petition for Panel Rehearing. The Petition for Rehearing was denied on October 11, 2005. The Order is attached hereto as Appendix "B". The unpublished Decision of the Board of Immigration Appeals dated January 10, 2003, is set forth as Appendix "C".

STATEMENT OF JURISDICTION

The judgment of the United States of Appeals for the Second Circuit was entered on August 9, 2005. Jurisdiction of the United States of Appeals for the Second Circuit is based upon 8 USC Section 1252(a)(2)(B)(ii), in that the appeal was from a decision of the Board of Immigration Appeals of the Executive Office of Immigration Review (hereinafter "EOIR"). Jurisdiction of the United States of Appeals for the Second Circuit is also founded on the United States Code Title 8 Section 1291 and Section 1254.

The Petition for Writ of Certiorari has been filed on January 9, 2006, within the period prescribed by law ninety (90) days from the date of the decision of the United States of Appeals for the Second Circuit on October 11, 2005, denying Petitioner's petition for Rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The question presented for review implicates the following provision of the Constitution of the United States:

Amendment V

No person shall be ... deprived of life, liberty, or property without due process of law ....

The question presented for review implicates the following statutory provisions:

a. 8 USC Section 1229c, which states that the Attorney General may permit an alien to voluntarily depart the United States at the alien's own expense if the Immigration Judge enters an order granting voluntary departure in lieu of removal and finds that the following four requirements are met:

1. The alien must have been physically present in the United States for at least one year prior to the service of the Notice to Appear (NTA).
2. The alien must be found to have had good moral character for at least five years prior to the granting of voluntary departure.
3. The alien must not be deportable under the aggravated felony section (1227(a)(2)(A)(iii)) or the security-related grounds in 1227(a)(4).
4. The alien must establish, by clear and convincing evidence, that he or she has the means to depart the United States, and intends to do so. 8 U.S.C. § 1229c(b)(1)(A)-(D).

b. INA Section 242B(e)(2)(B) provided that first, the consequences of failing to depart did not apply unless proper notice was provided. Second, the statute also required that both written and oral notice (in a language the person understands) was provided.

The section goes on to call for "notice" to be given to the one being granted voluntary departure. Section 240B(d) of the ACT requires that the notice granting voluntary departure inform the person of the consequences of failing to depart. The statute states, "The order permitting the alien to depart voluntarily shall inform the alien of the penalties under this subsection."

c. Former section 242B of the Immigration and Nationality Act ("INA" or the "Act") provides that an individual is ineligible for adjustment of status if he or she was granted voluntary departure but nonetheless remained in the United States. The statutory period of ineligibility is five years "after the scheduled date of departure or the date of unlawful reentry, respectively." 8 U.S.C. Section 1252b(e)(2)(A) (Supp. 1995).

d. Under Section 242B(e)(2), in pertinent part, as follows:

> (A) IN GENERAL.---Subject to subparagraph (B), any alien allowed to depart voluntarily under section 244(e)(1) or who has agreed to depart voluntarily at his own expense under section 242(b)(1) who remains in the United States after the scheduled date of departure, other than because of exceptional circumstances, shall not be eligible for relief

described in paragraph (5) for a period of 5 years after the schedule date of departure or the date of unlawful reentry, respectively.

Under Section 242B(e)(5), the relief described in subparagraph (A) includes "voluntary departure under Section 242(b)(1)," "suspension of deportation or voluntary departure under Section 244," and "adjustment or change of status under Section 245, 248 or 249." The term "exceptional circumstances" refers to "exceptional circumstances (such as serious illness of the alien or death of an immediate relative of the alien) beyond the control of the alien." Section 242B(f)(2) of the Act.

REASONS FOR GRANTING THE WRIT

1. The instant petition involves a legal issue of whether an alien who did not obey an invalid voluntary departure order and did not receive a proper and clear notice of the consequences of failing to depart as required by former INA Section 242B(e)(2)(B), is barred from statutory relief to adjust his status. The administrative record clearly shows that the IJ did not make the findings of whether Petitioner had the means to depart the United States and intended to do so when the IJ granted Petitioner voluntary departure. Granting voluntary departure is not the discretion of the IJ; therefore, the voluntary departure order is invalid without the findings of statutory requirements. Furthermore, Petitioner did not receive the written notice and oral notice in both English and Chinese of the consequences of failure to depart (INA § 242B (d), (e)(2)(B)). Thus, Petitioner is not barred for statutory relief to adjust his status.

2. Further, the instant petition involves a question of exceptional importance, whether or not, the BIA's reinstatement of voluntary departure in *Matter of Chouliaris* and *Matter of Sharr* is unconstitutional, full regard of constitutional rights should be given to an alien if he is in the United States and pursues administrative review. There had been eight years passed at the time the BIA denied Petitioner's motion to reopen based upon his Section 245(i) beneficiary status since he was granted the voluntary departure on June 04, 1996. The requisite to qualify for statutory relief accrued to more than five years due to the BIA's reinstatement of voluntary departure. The BIA's reinstatement of voluntary departure infringes Petitioner's constitutional right to due process for administrative review.

3. There is a conflict between the Circuits in construing the "compelling reasons" for exceptional circumstance in terms of statutory relief. The Second Circuit narrowly interpreted the statute (INA § 242B(e)(2)), ruling that the change of law and extreme hardship for a business and petitioner were not the compelling reasons for exceptional circumstance. It is recognized by the Third Circuit and Ninth Circuit and subsequently adapted by the IJ and BIA that the failure of departure but with a good-faith-filing motion for Section 245(i) relief within the period of voluntary departure constitutes the exceptional circumstance for relief ban.

STATEMENT OF THE CASE AND FACTS

Petitioner, Chun Wang, a native and citizen of the People's Republic of China, who fled to the United States under an assumed name on or about December 4, 1994, sought political asylum based upon his opposition to the China's coercive family planning and involvement in the pro-democracy movement.

Petitioner and his wife, ZHENG, Qingfang, got married in China in the month of December 1992 and were unable to have the marriage officially registered at that time due to his wife being under age. The marriage certificate was not actually issued until October 1994 after his wife paid the ¥ 3000 (RMB) fine. During this period Petitioner and his wife had their first child, a girl named WANG, Shi Ting born on September 21, 1993 (lunar calendar) or November 04, 1993 (Gregorian calendar) in China.

Subsequent to the birth of their child, Petitioner continued to be unaware of the existence of the marriage certificate even during his June 5, 1996 individual hearing before the IJ. At the end of 1996, Petitioner called his wife, mentioning that he might lose the asylum case. It was then, that Petitioner's wife disclosed the existence of the marriage certificate.

Petitioner's wife was demanded by Chinese family planning officials to wear IUD after their first child was born. Both Petitioner and his wife refused to insert the IUD and Petitioner had an argument with the local authorities for such refusal. In or around February 1994, the Petitioner attempted to register their daughter into the household registry but was

turned away by the local authorities due to their refusal to insert the IUD.

A summons demanding that Petitioner report to the local police precinct on April 25, 1994 was issued as a result of his argument with the local authorities over their refusal to insert the IUD. Petitioner went into hiding in Hebei Province in May of 1994. He left China for the safety of the United States on or about December 4, 1994.

A removal hearing was held before the Immigration Court on or about June 5, 1996. The IJ denied Petitioner's application for asylum and for withholding of deportation under the INA due to the lack of credibility. In addition, the IJ ordered a voluntary departure until July 5, 1996 with an alternative order of deportation to the People's Republic of China. However, in the hearing, Petitioner did not request for a voluntary departure, nor did the IJ make the findings whether Petitioner had the means to depart the United States, as 8 USC § 1229c requires. As a matter of fact, Petitioner did not possess a valid passport at that time.

Upon remand to the Immigration Court after a timely appeal to the BIA by Petitioner, a removal hearing was held on September 23, 1998 by the same IJ. On November 12, 1998, the IJ denied Petitioner's application for asylum upon his opposition to the China's coercive family plan and for withholding of deportation, once again due to the lack of credibility. In addition, the IJ ordered a voluntary departure until December 21, 1998 with an alternative order of deportation to the People's Republic of China. Again, Petitioner did not have the intent to depart the United States nor have a valid passport to depart at that time.

On November 27, 1998, Petitioner appealed the IJ's decision to the BIA. On June 4, 2002, the BIA affirmed the IJ's decision without opinion. In addition, the BIA ordered a voluntary departure.

On September 3, 2002, Petitioner filed a Motion to reopen the BIA's decision. On October 28, 2002, Petitioner filed a supplemental Motion to Reopen, asserting that he was eligible to Section 245(i) benefit based upon an I-140 Petition (Immigrant Petition for Alien Worker) approved by the Immigration and Naturalization Service on September 23, 2002, and a pending I-485 Application (Application to Adjust Permanent Resident Status). Pursuant to 8 C.F.R. Section 204, 245, and 299, INS No. 2104-00, RIN 1115 – AGOO ("Allowing in Certain Circumstances for the Filing of Form I-140 Visa Petition Concurrently With a Form I-485 Application"), for an alien in deportation or removal proceedings, if an immigration petition for the alien is approved and a visa is or becomes immediately available, the alien must affirmatively move the IJ or the BIA in order to consider his adjustment application for adjudication, or remand the application for adjustment of status to the INS for adjudication if the INS concurs in the remand.

The BIA denied Petitioner's motions on January 10, 2003. In so ruling the BIA stated that Petitioner failed to meet the requirements for a motion to reopen, in addition, barred him from adjusting his immigrant status due to his failure to voluntarily depart the United States.

ARGUMENT

I. The Decision below conflicts with the statutes.

In the case at Bar, the Second Circuit has not followed the statutes as found at 8 USC Section 1229c and INA Section 242B(e)(2)(B). The Second Circuit erroneously failed to reverse the IJ's voluntary departure decision which was not supported by the findings of the four statutory requirements, and failed to reverse the BIA's denial of statutory relief despite that the IJ did not give Petitioner a clear and proper notice of the consequences of failure to depart.

Petitioner never proffered nor was required to proffer in hearings any evidence that he had the means to depart the United States and intended to do so. As a matter of fact, Petitioner, at the time of his hearings on or about June 05, 1996 and November 12, 1998, was not in possession of a valid passport. This being the situation at the time he could not have demonstrated the means to depart the United States as the lack of a valid passport precluded him from having the means to legally leave the country as well as to enter other countries. Furthermore, Petitioner never requested for a voluntary departure, nor did he express his intention to voluntarily depart the United States. The Second Circuit overlooked the IJ's misapplication of the statute; therefore, the Second Circuit's decision directly conflicted to the four requirements codified in 8 USC Section1229c, which specifies that an alien must establish, by clear and convincing evidence, that he or she has the means to depart the United States, and intends to do so. Thus, the IJ's grant of voluntary

departure was invalid in the first place when the IJ decided in 1996 initial hearing and 1998 subsequent hearing upon remand.

The statute suggests that the IJ should instruct the alien the differences between voluntary departure and removal or deportation in order to make the finding of alien's intention to voluntarily depart the United States. 8 USC Section 1229c. In addition, the consequences of failing to depart did not apply unless the proper and clear notice in written and oral was provided. INA Section 242B(e)(2)(B). However, Petitioner did not receive any instruction by the IJ in the differences between voluntary departure and removal or deportation. Furthermore, a notice on the penalty of the failure to voluntarily depart, which was given in an oral decision in English, to Petitioner as a non-English speaker, is obviously not a clear and proper notice. In deed, Petitioner was never noted that the removal or deportation was different from the voluntary departure in that an alien is not bar to adjust his status due to his failure to remove from the United States. In understanding of the November 12, 1998 the IJ's decision:

> "if the respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings...The respondent shall be deported from the United States to the People's Republic of China on the charge contained in the Order to Show Cause."

Petitioner considered that it was his obedience to the order if the purpose of the failure to depart voluntarily and

timely was to receive a deportation order upon the withdrawal of voluntary departure order, because Petitioner did not have the intent to voluntarily depart from the United States. "The order permitting the alien to depart voluntarily shall inform the alien of the penalties under this subsection." INA Section 240B(d); *see Matter of Arguelles,* 22 I&N Dec. 811, 818 (BIA 1999). Both written and oral notice (in a language the person understands) shall be provided; otherwise, the consequences of failing to depart did not apply unless proper notice was provided. INA Section 242B(e)(2)(B). It was Petitioner's intention to comply with the IJ's order, however, unfortunately, the notice was improper and unclear in that it was not a written notice in alien's language to a non-English speaker, subsequently, causing Petitioner's misunderstanding to the obedience of the order. Thus, Petitioner is not barred from the eligibility for future relief such as adjustment of status because Petitioner did not receive clear and proper notice, in written and oral, of the consequences of failing to depart as required by former INA Section 242B(e)(2)(B).

In the case at Bar, there was no a valid voluntary departure order by the IJ at the first place on June 05, 1996, contrary to the Second Circuit's decision, since the administrative record demonstrates that there was no findings of the statutory requirements in support of the grant of voluntary departure. Petitioner's remaining in the United States under an invalid order did not constitute the failure to depart before the authorized date. Moreover, Petitioner did not receive adequate notice of the consequences of failing to depart, contrary to the Second Circuit's decision, due to the facts disclosed that the IJ gave Petitioner an oral advisory in English. In short, the Second Circuit incorrectly decided that

Petitioner's claims were meritless. Petitioner shall not be barred from other forms of relief such as adjustment of status.

II. The Second Circuit's judgment in affirming the BIA's authority of reinstatement of voluntary departure following *Matter of Chouliaris and Matter of Shar* is unconstitutional.

Contrary to the Second Circuit's Decision, Petitioner's due process right to meaningful administrative review is deprived by the BIA's authority of reinstatement of voluntary departure.

Petitioner has the statutory right to appeal and move the BIA to reopen proceedings in according to 8 C.F.R. Section 3.1, 2. At the meanwhile, any administrative review and judicial remedy does not act automatically to stay Petitioner's removal. 8 USC Section 1105(a)(3), as amended by Section 513 of the Immigration Act of 1990, Act of Nov. 29, Pub. L. 101-649, 104 Stat. 4978. Petitioner is subject to removal any time once the voluntary departure is granted by the IJ even though he files appeal or motion with IJ or BIA. Nonetheless, Section 242B(e) of the Immigration and Nationality Act ("INA"), 8 U.S.C. Section 1252b(e)(2)(A) (repealed 1996), prohibits an alien who has remained in the United States after the scheduled date of voluntary departure from applying for certain forms of relief, including an adjustment of status, for a period of five years. A proper showing of "exceptional circumstances" is the only escape from the clear strictures of that provision. *See* 8 U.S.C. Section 1252b(e)(2)(A), (f)(2) (repealed 1996). However, whenever Petitioner executes his statutory right to appeal or move the BIA for reopen, the BIA can reinstate a new

voluntary departure date according to *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977) (holding that an appeal from an immigration judge's decision tolls the voluntary departure period), *Matter of Sharr*, 21 I&N Dec. 541 (BIA 1996).

The June 5, 1996 decision by the IJ, according to the former INA Section 244(e), stated that the voluntary departure date was to be July 5, 1996. Petitioner appealed to the BIA on or about June 6, 1996. BIA remanded the record to the IJ for further findings regarding Petitioner's coercive population control claim on February 10, 1998, which was two years later than the initial IJ's decision was made. On November 12, 1998, the IJ rendered a remand decision and reinstated a new voluntary departure dated December 21, 1998. Petitioner appealed to the BIA on November 27, 1998. Again, in accordance with BIA's decision in *Matter of Chouliaris,* the BIA reinstated a voluntary departure dated July 04, 2002, which was seven years after the initial June 05, 1996 decision by the IJ. Petitioner moved the BIA to reopen proceedings in order to adjust his status based upon his eligibility for adjustment of status under Section 245(i). However, the BIA denied his request for the reason of five-year bar for adjustment of status on January 10, 2003, which was eight years after the first grant of voluntary departure by the IJ on June 04, 1996.

The crucial issue here is when the five-year bar started to run, from the initial voluntary departure date of July 05, 1996 granted by the IJ or the last voluntary departure date of July 04, 2002 reinstated in the BIA's appeal decision, which was seven years after the IJ's decision. If the grant of voluntary departure by the IJ on June 05, 1996 were valid, Petitioner would be subject to be physically removed and

deported from the United States at any time after the voluntary departure date of July 05, 1996 fixed by the IJ in the initial removal rehearing. 8 USC Section 1105(a)(3), as amended by Section 513 of the Immigration Act of 1990, Act of Nov. 29, Pub. L. 101-649, 104 Stat. 4978. Petitioner would be prohibited from applying for certain forms of relief, including an adjustment of status, for a period of five years because he has remained in the United States after the scheduled date of voluntary departure. Section 242B(e) of INA, 8 U.S.C. Section 1252b(e)(2)(A) (repealed 1996). However, in the decisions of *Matter of Chouliaris* and *Matter of Sharr,* the BIA exercised its authority to reinstate voluntary departure, which trumps 8 U.S.C. Section 1252b(e)(2)(A), (f)(2)'s relief requirement that those who were allowed but failed to depart voluntarily other than by reason of "exceptional circumstances" can apply for a readjustment of their immigrant status for five years. Accordingly, every time when the BIA reinstates voluntary departure, the requisite to qualify for such relief accrues to more than five years.

Under former INA Section 242B(e)(2)(A), the five-year penalty period began to run "after the scheduled date of departure or the date of unlawful reentry", despite that a later voluntary departure date was granted to the Petitioner after the 1998 remand hearing by IJ and another voluntary departure date was granted again in 2002 appeal by BIA, Thus, the expiration of the five-year bar began from July 05, 1996 according to the IJ's voluntary departure decision.

The authority of reinstatement of voluntary departure by the BIA in accordance with the decisions of *Matter of Chouliaris* and *Matter of Sharr* is unconstitutional. The

accrual of the requisite more than five years for statutory relief constitutes the penalty to aliens who exercise their constitutional right to due process for administrative review. Judge Browning, who wrote in dissent, went to great lengths to expose the flaws of the BIA's interpretation.

> The dissent charged: " [The majority's] interpretation ignores Congress' intent that aliens be permitted to file, and the Immigration and Naturalization Service . . . be required to hear, a single, timely-filed, meritorious motion to reopen; it treats similarly situated aliens in a disparate manner, and forces aliens to forgo congressionally-authorized relief or face a substantial penalty." *See Shaar*, 141 F.3d at 959-64

The Second Circuit erroneously ruled against Petitioner's argument that the five-year bar began to run after the initial grant of voluntary departure in 1996. Petitioner has been put in the dilemma situation which either forgoes his due process right for administrative review or accepts the accrued requisite more than five years to qualify for statutory relief. The decisions in *Matter of Chouliaris* and *Matter of Sharr,* authorizing the BIA to reinstate the voluntary departure, impose the extra penalty on the length of the ban on aliens who exercise their due process right to pursue administrative review. Thus, the decisions of *Matter of Chouliaris* and *Matter of Sharr* are unconstitutional. Contrary to the Second Circuit's decision, Petitioner is eligible to statutory relief to adjust his status when he moved the BIA to reopen on September 3, 2002, at which time a total of six years had passed since the initial grant of voluntary departure by IJ in 1996.

III. The Decision below conflicts with authority from other circuits.

Circuits split in construing the "compelling reasons" for exceptional circumstance in terms of statutory relief. While the Second Circuit denied that the enactment of Section 245(i) constituted an exceptional circumstance because the alien was not unable, rather than unwilling, to comply with the departure deadline, it is widely recognized by the Circuits (3rd and 9th Circuits) and subsequently adapted by the IJ and BIA that the failure of departure but with a good-faith-filing motion for Section 245(i) relief within the period of voluntary departure constitutes the exceptional circumstance for relief ban even though alien is able to depart but willing to stay in the Untied States.

Here, the statute is silent – it does not define the term "exceptional circumstances" but provides the compelling standard of exceptional circumstance as beyond the control of the alien, such as serious illness of the alien or death of an immediate relative of the alien. Section 242B(f)(2) of the Act.

In terms of "exceptional circumstance" for statutory relief, there is a conflict between Ci[illegible]its. The Ninth Circuit, in 1998, held in *Sharr* that the mere filing of a motion to reopen does not constitute "exceptional circumstances" within the meaning of the statute. *Shaar v.INS*, 141 F.3d 953, 956 (9th Cir. 1998). However, the Ninth Circuit modified its ruling in *Velezmoro* in 2004. The Ninth Circuit, in *Velezmoro*, remanded the case to the BIA for it to consider whether Velezmoro continued to be barred from applying for

adjustment of status because "were we to deny Velezmoro's petition, we would effectively turn Congress' five-year ban into a much longer period of ineligibility" *Velezmoro v. Ashcroft*, No. 02-73244 (9th Cir. Apr. 1, 2004) Likewise, the Third Circuit, in *Miguel Francisco Castro Barrios v. Attorney General Of The United States* (3rd Cir. May 25, 2005), stated that filing a motion to reopen for section 245(i) relief based on alien's recent marriage eight days before alien's voluntary departure period expired was good faith filing; therefore, alien has satisfied the compelling standard and fell in the "exceptional circumstance". In its decision, the Third Circuit concluded:

> "We find the reasoning in the *Shaar* dissent persuasive. We thus hold that the failure of the immigration authorities to act on a legitimate application for relief filed within the voluntary departure period is an exceptional circumstance "beyond the control of the alien." 8 U.S.C. § 1252b(f)(2); *see Shaar*, 141 F.3d at 964 (Browning, J., dissenting)." In so ruling, the Third Circuit reasoned that:
> "Although mindful of the deference normally due to the agency's interpretation of the INA, we cannot agree that *Matter of Shaar* is a permissible interpretation of the statute, at least insofar as the BIA narrowly construed the "exceptional circumstances" provision to exclude the good faith filing of a motion to reopen deportation proceedings within the voluntary departure period. Such an interpretation is unwarranted for two principal reasons. First, the statute does not define "exceptional circumstances" other than to

> provide that they should be at least as compelling as those caused by serious illness or the death of an immediate relative. *See* 8 U.S.C. § 1252b(f)(2). Second, and more importantly, the BIA's construction of the statute elevates and promotes the date of adjudication over the date of filing. We cannot agree that such a construction is reasonable and comports with congressional intent."

Circuits apply different standards in judging the compelling reasons for exceptional circumstance. While the Third Circuit and Ninth Circuit concluded that good faith filing of section 245(i) relief fell in exceptional circumstance where the alien was obvious able to but unwilling to depart, in the case at Bar and the decision of *Mardones v. McElroy*, 197 F.3d 619, 624 (2d Cir. 1999), the Second Circuit erroneously narrowed "compelling reasons" of exceptional circumstance only as "willing but unable" to depart. There is a split in interpreting the statute of 8 U.S.C. § 1252b(f)(2) in terms of the standard of "compelling reasons" for exceptional circumstance for relief.

The Second Circuit's decision in this case at Bar also conflicted with its own decision in *Mardones* in that it ruled that the reason of a moral imperative constituted the exceptional circumstance in *Mardones v. McElroy,* such as the death of an immediate relative; but it did not consider that the change of law of Section 245(i) as compelling reason as well as the death of a business in light of the leave of a skilled worker as moral imperative for the exceptional circumstance.

Petitioner arrived in the United States on December 4, 1994 and over the course of the next eleven years developed extensive ties within the United States as well as certain liberty interests. First of all, the change of law was beyond Petitioner's control. The amended Section 245(i) in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 allowed aliens to seek relief for adjustment of status. Secondly, a shortage of skilled workers was the uncontrollable circumstance. None of the elements involved in processing of the I-140 Petition was under the control of Petitioner, such as approval date and scrutiny standards. Thirdly, it was also beyond Petitioner's control that the IJ's decision required a departure on a specific date while Section 245(i) of INA allowed him to remain in the United States if he wished to avail himself of the privileges of an approved I-140 petition. Therefore, the approval of the I-140 by INS based upon Petitioner's Section 245(i) beneficiary status was beyond Petitioner's control. The change of law of Section 245(i) is within the definition of an "exceptional circumstance".

The extreme hardship to both Petitioner's employer and Petitioner has also constituted exceptional circumstance. Petitioner's employer would face the decline of business caused by the loss of a skilled and experienced worker; on the other hand, Petitioner would be forced to face an unfair choice: leave the United States voluntarily (thereby abandoning his immigrant petition and adjustment status application) or remain in the United States to pursue the petition (thereby violating the voluntary departure conditions). In Contreras-Aragon v. INS, 852 F.2d 1088, 1090 (9th Cir. 1988) the Court declined to sanction a policy that 'effectively forced the alien to choose between

exercising an award of voluntary departure and pursuing judicial relief." *Id* at 1095. The foreseeable hardship to Petitioner and his employer constituted an "exceptional circumstance" under Section 242B(f)(2) of the Act.

The Circuits split in construing "compelling reasons" for exceptional circumstance for statutory relief while the statute is silent at the term of "compelling reasons". The Second Circuit erroneously narrowed the "compelling reason" to "unable rather than unwilling" as beyond the control of the alien. The Second Circuit overlooked the factual evidence provided by Petitioner within the definition of "exceptional circumstances" under Section 242B(f)(2) of the Act. In the light of the foregoing, the decision of the Second Circuit must be vacated and the case remanded to allow the Immigration Judge to make a determination on whether the relief for adjustment of status being sought by Petitioner is warranted under the existing provision of law.

CONCLUSION

WHEREFORE, Petitioner, WANG, Chun, after a careful consideration of the merits of the instant petition, respectfully prays to this Hon. Court to reverse, recall, or set aside the judgment of the Second Circuit, on the grounds that it is not in conformity with above-cited provisions of law, and is not supported by evidence on the record, and to issue an Order remanding Petitioner's application for adjustment of status to the Immigration Judge, which has jurisdiction over the instant case, to conduct further proceedings, insofar as Petitioner's request for relief is concerned.

Respectfully submitted this 6th day of January, 2006

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSE OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 9th day of August, two thousand and five.

PRESENT:
HON. GUIDO CALABRESI,
HON. REENA RAGGI,
Circuit Judges,
HON. J. GARVAN MURTHA*
District Judge.

Seal: UNITED STATES COURT OF APPEALS SECOND CIRCUIT FILED AUG-9 2005 Roseann B. MacKechnie, CLERK

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* The Honorable J. Garvan Mrutha, United States District Judge for the District of Vermont, sitting by designation.

CHUN WANG
Petitioner,

v.

INS: A73-537-173
No. 03-4231

UNITED STATES DEPARTMENT OF JUSTICE,
ATTORNEY GENERAL ALBERTO R. GONZALES,**
Respondents.

** Pursuant of Federal Rule of Appellate Procedure 43(c)(2), Attorney General Alberto R. Gonzales is automatically substituted for former Attorney General John Ashcroft as a respondent in this case.

For Petitioner: JOE ZHENGHONG ZHOU, FLUSHING, N.Y.

For Respondent: ROBERT K. COULTER, Assistant U.S. Attorney, *for* PAUL J. McNULTY, U.S. Attorney for the Eastern District of Virginia, Alexandria, Va.

On petition for review from the Board of Immigration Appeals ("BIA")

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the petition for review is DENIED

Petitioner Chun Wang, a native and citizen of the People's Republic of China, petitions for review of the BIA's denial of his motion to reopen his application for asylum and withholding of removal under the Immigration and Naturalization Act ("INA").[1] We assume the parties'

[1] After filing his initial motion, Wang filed a revised motion presenting another ground for reopening.

familiarity with the facts, the procedural history, and the specification of the issues.

Wang moved for reopening, *inter alia,* on the ground that he was eligible for an adjustment of status under INA § 245(i), 8 U.S.C. § 1255(i)(2000). The BIA found that Wang's failure to depart voluntarily within thirty days of his final removal order, as required by that order, rendered him ineligible for an adjustment in status, under former INA § 242(e)(2)(A), 8 U.S.C. § 1252b(e)(2)(A) (repealed 1997)[2], for a period of five years. [JA 48, JA 22] Before this Court, Wang argues that the five-year bar on relief should not apply in light of "exceptional circumstances"—in particular, the approval, after Wang's thirty day departure deadline had passed, of an I-140 alien worker petition filed by Wang's employer on his behalf. [JA 50]

But, under the law of this circuit, the "exceptional circumstances" exception to the five-year bar on relief applies when "depart[ing] the United States voluntarily… [is] *impossible* for physical reasons, such as a serious illness, or by reason of a moral imperative, such as the death of an immediate relative." *Mardones v. McElroy*, q97 F.3d 619, 624 (2d Cir. 1999). The circumstances Wang describes do not reach this high bar.

Wang also contends that he did not receive adequate notice of the consequences of his failure to depart voluntarily. The record, however, demonstrates that he did receive

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[2] This provision of the INA, which has since been repealed, applies to Wang under the Illigal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, section 309(c), 110 Stat. 3009-546, 3009-625 to 3009-627.

adequate notice. Wang makes additional arguments---that the immigration Judge erred in granting voluntary departure, that the five-year bar on relief began after the initial grant of voluntary departure, in 1996, and hence, has now lapsed, and that he was denied due process at his removal hearing---all of which are manifestly meritless.

We have considered all of Wang's claims and find them to be without merit. The petition for review is therefore DENIE, and the outstanding motion for stay of deportation is DENIED.

For the Court,
ROSEANN B. MACKECHNIE, Clerk of the Court

By: S/ Oliva M. George
Oliva M. George, Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURTHOUSE
40 FOLEY SQUARE
NEW YORK 1007

Roseann B. MacKechnie
CLERK

Date: 10/5/05

Docket 03-4231-ag
Short Title: Wang v. INS
Agency Number: A73-537-173
Agency: Immigration & Naturalization Service

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United Stated Courthouse, Foley Square, in the City of New York, on the 11th day of OCT. two thousand five.

Present:

Hon. Guido Calabresi, Circuit Judge

Hon. Reena Raggi, Circuit Judge

Hon. J. Garvan Murtha, District Judge

Seal: UNITED STATES COURT OF APPEALS SECOND CIRCUIT FILED OCT 11 2005 Roseann B. MacKechnie, CLERK

CHUN WANG,
Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATRUALIZATION SERVICE, JOHN ASHCROFT, Attorney General,
Respondents.

A petition for panel rehearing having been filed herein by Chun Wang

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

For the Court,
Roseann B. MacKechnie, CLERK
By: s/ (unreadable letters)
Motion Staff Attorney

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Zhou, Joe Zhenghong, Esquire
36-09 Main Street Suite 9-B
Flushing, NY 11354-0000

Office of the District Counsel /NY
26 Federal Plaza, Room 1130
New York, NY 10278

Name: Wang, Chun A73-537-173
Date of this notice: 01/10/2003

Enclosed is a copy of the Board's decision and order on the above-referenced case.

Sincerely,

S/ Jeffrey Fratter
Jeffrey Fratter
Chief Clerk

Enclosure
Panel Members: Grant, Edward R.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A73-537-173 – New York Date: Jan 10 2003

In re: Wang, Chun

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Zhou, Joe Zhenghong, Esquire

ON BEHALF OF SERVICE: Philip J. Costa, Assistant District Counsel

ORDER:

PER CURIAM. The respondent moves the Board pursuant to 8 C.F.R. Section 3.2 to reopen our decision dated June 04, 2002. The original basis for this motion to reopen was that the respondent felt that by filing his appeal on his own, pro se, and by failing to address or challenge the Immigration Judge's adverse credibility finding, he was deprived of a fair opportunity to present his case." Respondent's Motion to Reopen at 6. We find that the motion does not present any new and material evidence that previously could not have been presented. We noted that it

also does not provide any basis for concluding that our prior order was incorrect either as a matter of law or fact based on the record which was before us which would give rise to a due process challenge and our reconsideration. In short, the respondent's concern for fairness which he is bringing up now is on which only he could have addressed by retaining legal counsel to aid him on appeal. On October 28, 2002, during the pendency of this action, the respondent filed a supplemental motion, requesting that the Service filed an opposition in which it points out that the respondent is barred from adjusting his status because of his failure to voluntarily depart, as promised. We agree with the Service's position. Matter of Sharr, 21 I&N Dec. 541 (BIA 1996). Accordingly, the Motion is denied.

S/ ER Grant

FOR THE BOARD